



Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

Peter A. DeFazio
Chairman

Katherine W. Dedrick, Staff Director

Sam Graves
Ranking Member

Paul J. Sass, Republican Staff Director

December 17, 2019

The Honorable Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Wheeler:

I write to express my deep frustration on your continued efforts to gut critical Clean Water Act protections over rivers, lakes, streams, and other waterbodies throughout the Nation while hiding the real impact of these efforts from the American public. The Trump Dirty Water Rule¹, if finalized, will represent the single largest rollback in clean water protections in history and eliminate bipartisan protections over our waters and wetlands championed by Democratic and Republican administrations alike since enactment of the Clean Water Act in 1972. I urge you, again, to immediately withdraw this proposal from consideration.

As you know, internal U.S. Environmental Protection Agency (EPA) documents have estimated that proposals from the Dirty Water Rule could *eliminate current Clean Water Act protections on between 18 to 71 percent of the Nation's streams and over 50 percent of wetlands.*² However, despite numerous Congressional requests to EPA to quantify the exact scope and nature of waters that lose Clean Water protections under the Dirty Water Rule, EPA has refused to provide the American people with clear answers. Your agency's repeated refusal to provide information on the scope of waters that lose protection leads me to conclude that EPA's internal estimates are accurate, or worse still, underestimate the real impacts of the Dirty Water Rule.

In addition, your repeated refusal to publicly quantify the scope of waters that would lose existing Clean Water protection under the Trump Dirty Water Rule is unreasonable, as the American public and affected stakeholders are deprived of any information on how their lives and livelihoods

¹ 84 Fed. Reg. 4154 (2019).

² See Letter from Transportation and Infrastructure Chairman Peter A. DeFazio, et. al, to EPA Administrator Wheeler and Assistant Secretary of the Army James (April 9, 2019) (Docket ID: [EPA-HQ-OW-2018-0149-4847](#)).

will be affected by this action – which is contrary to the Administrative Procedures Act prohibition on “arbitrary and capricious” agency actions.³

In his Executive Order 13778, entitled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States’ Rule,” President Trump directed EPA and the U.S. Army Corps of Engineers (“Corps”) to “rescind or revise” the Obama administration’s Clean Water Rule, dated June 29, 2015 (“2015 rule”).⁴ In 2019, the EPA and Corps published its Dirty Water Rule to replace the 2015 rule and transmitted the Rule to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) earlier this month for review.⁵ According to OIRA, a final rule will be issued in early 2020.

The Committee on Transportation and Infrastructure is responsible for Congressional oversight of the Clean Water Act, and any proposed impacts to this Act made by your Dirty Water Rule. During the September 19, 2019, hearing before the Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, EPA’s Assistant Administrator for the Office of Water, David Ross, was asked questions on the impacts of this Rule by several members of the Subcommittee, including myself. Yet, Mr. Ross was unwilling to substantively answer any questions on the impacts of the Dirty Water Rule or on the adverse economic consequences that will likely result from waters losing critical Federal protections.

For example, when I asked Mr. Ross about what percentage of currently protected waters would be eliminated by removing protections for ephemeral streams, he answered, “*Actually, we don’t [know]. We do not have maps.*” Yet, EPA, itself, in its Economic Analysis to accompany the Dirty Water Rule, noted that ephemeral streams represent about 18 percent of the Nation’s stream miles, and recognized that this number is likely an “understatement of ephemeral streams” contained in the United States.⁶

When I asked Mr. Ross about the impact of removing Clean Water protections on the 52 percent of stream miles classified by EPA as intermittent streams – on which the Dirty Water Rule encouraged additional public comment – again, he suggested EPA does not have this data.

When I asked Mr. Ross to explain how many wetlands would lose Clean Water protections under the Dirty Water Rule, he answered, “*Actually, we also do not know that as well...*”. Yet, EPA’s own internal estimates – which, to the best of my knowledge, the agency has never refuted – suggest that this Rule would eliminate protections for over 50 percent of the Nation’s wetlands.⁷

When I asked Mr. Ross to quantify the “costs and environmental effects of jurisdictional changes” (identified in EPA’s economic impacts analysis on the Dirty Water Rule⁸) from downstream flooding damages, increased drinking water costs and dredging costs, and increased oil spill response costs, Mr. Ross, again, told the Committee “*We do not have the data.*”

³ 5 U.S.C. 706.

⁴ 80 Fed. Reg. 37054 (2015).

⁵ See <https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp>

⁶ See https://www.epa.gov/sites/production/files/2018-12/documents/wotusproposedrule_ea_final_2018-12-14.pdf.

⁷ See https://www.eenews.net/assets/2018/12/11/document_gw_05.pdf.

⁸ See id at 133.

It is simply unreasonable for an agency to suggest it cannot quantify the impact of an agency rulemaking on those who may be directly affected by this action. This is especially true for a rulemaking that will significantly impact regulated entities and American families under several environmental statutes, including the Clean Water Act and the Oil Pollution Act, as well as put at risk the drinking water sources for over 117 million Americans.

Over and over-again, EPA representatives had tried to suggest that the impacts of the Dirty Water Rule are unknowable because the agency doesn't have the right "maps." However, this lack of detailed maps is simply a ruse to avoid explaining the impacts of your Dirty Water Rule to the American people.

As you know, the previous administration provided Congress and the American public with detailed information on the potential impacts of its 2015 Rule, including forecast changes in the scope and nature of waters and wetlands that would have been affected by that proposal.⁹ Yet, your agency has refused to provide similar information on the impacts of the Dirty Water Rule.

Similarly, your Dirty Water Rule proposal would eliminate Clean Water protections on entire categories of waters and wetlands, such as ephemeral streams and wetlands without specified connections to other waterways. It is unreasonable for your agency to suggest that it has no information on the potential impacts of removing whole categories of waters and wetlands to our communities or to the economic and environmental health and services provided by these waterbodies. This is not an analysis of whether a particular wetland or stream would remain subject to the Clean Water Act or not; it is about the economic and environmental consequences of removing entire categories of rivers, lakes, streams, and wetlands from existing Clean Water protections.

Given your agency's lack of transparency regarding the impacts of this rule, moving forward on this rule – a rule with the potential to forever adversely impact the Nation's water resources – is unreasonable, arbitrary and capricious.

In addition to the very important questions above that have yet to be answered, I am concerned that your agency has been unresponsive to several Congressional oversight requests from the Committee related to this important issue. As you know, the Committee on Transportation and Infrastructure has broad Congressional oversight responsibilities over the Federal statutes within the Committee's jurisdiction, including the Clean Water Act. However, your agency has failed to adequately respond to several oversight letters submitted by the Committee pursuant to these responsibilities.

For example, on October 11, the Committee sent your agency several questions for the record to Mr. Ross that have still not been answered. I am resending this letter to you as an attachment for your immediate response.

In addition, in those instances where EPA has provided a written response to Congressional oversight inquiries, these responses have been non-responsive to the questions posed by the

⁹ https://epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf.

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Committee. For example, in response to my letter dated July 29, 2019, EPA did not substantively answer several questions raised in that letter, and a number of documents requested by the Committee were withheld by your agency.

Further, in response, EPA is claiming a “deliberative process privilege” to withhold information from this Committee. This argument does not apply to Congress in its oversight and legislative roles. An agency’s rulemaking process is a key object of legislative scrutiny as it is legislative authority that gives agencies the ability to participate in substantive rulemaking. Congress did not abdicate its Congressional oversight role when delegating rulemaking to Federal agencies. Additionally, the procedures each agency must follow are outlined in legislation enacted by Congress.¹⁰

Similarly, EPA claims that “disclosure of pre-decisional information at this stage of the deliberations could raise questions about whether the agencies’ decisions are being made or influenced by proceedings in a legislative or public forum rather than through the established administrative process, which is ongoing.” However, I am unaware of any exemption contained in the Administrative Procedures Act – the Federal law establishing the process for Federal rulemaking – that would exempt Federal agencies from the lawful exercise of Congressional oversight inquiries.

This Dirty Water Rule should not be finalized because it would needlessly weaken our Nation’s premiere clean water law that has achieved remarkable improvements in water quality over the last four decades. Furthermore, action on this Rule should be stopped because of the complete lack of transparency regarding the impacts of this Rule, as well as the unwillingness of your agency to substantively respond to the oversight responsibilities of this Committee on this issue.

Again, I urge you to withdraw the Dirty Water Rule and recommit to your agency’s mission under the Clean Water Act to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. That is what the American people demand¹¹ of us, and what is right and just for generations of American families yet to come.

Sincerely,



PETER A. DeFAZIO
Chairman

¹⁰ See 5 U.S.C. § 553 (2000).

¹¹ McCarthy, Justin, “In U.S., Water Pollution Worries Highest Since 2001,” Gallup News, March 31, 2017.